Copyright Board
Canada

Commission du droit d'auteur
Canada

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Citation FILES: Retransmission 1995-1997 and 1991-10 (Variance)

Regime Retransmission of Distant Radio and Television Signals
Copyright Act, Section 70.63

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Statement of Royalties to be collected for the retransmission of distant radio and television signals during 1995, 1996 and 1997 (and variance to 1994 tariff)

Reasons for decision

I. INTRODUCTION

A. The Hearing

On March 31, 1994, eight collecting bodies (or collectives)[1] filed, pursuant to section 70.61 of the *Copyright Act* (the *Act*), statements of proposed royalties for the retransmission of distant radio and television signals for the years 1995, 1996 and 1997. All submitted statements for works carried on distant television signals, and three, the Canadian Broadcasters Rights Agency (CBRA), the Canadian Retransmission Right Association (CRRA) and the Society of Composers, Authors and Music Publishers of Canada (SOCAN), also submitted statements for works carried on distant radio signals.

The statements were published in the *Canada Gazette* of June 11, 1994. Objections were received from the Canadian Cable Television Association (CCTA), Canadian Satellite Communications Inc. (CANCOM) and Regional Cablesystems Inc. (Regional).[2]

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[1] The Border Broadcasters' Collective (BBC), the Canadian Broadcasters Rights Agency (CBRA), the Canadian Retransmission Collective (CRC), the Canadian Retransmission Right Association (CRRA), the Society of Composers, Authors and Music Publishers of Canada (SOCAN), the Copyright Collective of Canada (CCC), the Major League Baseball Collective of Canada (MLB) and FWS Joint Sports Claimants (FWS).

[2] On May 3, 1995, the Board granted a request from Regional and CANCOM to limit their participation to filing

At the request of the participants, the Board issued interim tariffs for 1995 and 1996, on December 23, 1994 and December 21, 1995 respectively. These tariffs extended the application of the 1992-94 tariffs until the certification of a final tariff for 1995 and beyond. Some changes were made to reflect amendments to the definition of small retransmission system.[3]

The participants before the Board were essentially the same as for the Board's retransmission decisions of October 2, 1990[4] and January 14, 1993.[5] The interests represented were described at length in the first decision. In a nutshell, collectives represent program suppliers (CCC and CRC), broadcasters (CRRA, CBRA, BBC and CRC), major sports leagues (FWS and MLB) and music rights owners (SOCAN), while the objectors represent a wide range of retransmitters.

Hearings were held on June 19, 20 and 21, 1995. The participants' final submissions were filed on September 22, 1995. Issues pertaining to allocation, title disputes and administrative provisions were dealt with in writing. The final submissions in this respect were filed in late October 1995.

B. A SHORT HISTORY OF THE RETRANSMISSION TARIFFS

On January 1, 1990, the *Canada-United States Free Trade Agreement Implementation Act* (*FTA*) imposed copyright liability for the retransmission of distant radio and television signals, introduced a compulsory licensing scheme for these rights, and charged the Copyright Board with establishing the royalties to be paid and allocating them among the collectives.

On May 9, 1989, Cabinet, pursuant to subsections 28.01(3) and 70.64(2) of the *Act*, adopted definitions of "distant signal" and of "small retransmission system."[6] The Board then embarked upon its first examination of the retransmission royalties. The resulting decision was challenged before Cabinet and on several points in the Federal Court of Appeal. All challenges failed.

On November 28, 1991, Cabinet, pursuant to subsection 70.63(4) of the *Act*, adopted criteria to which the Board must have regard in establishing the royalties to be paid under the tariff.[7] These criteria require the Board to take into account (a) American retransmission royalties, (b) the impact of the *Broadcasting Act* on the retransmission of distant signals, and (c) written agreements reached between collectives and retransmitters.

The Board then embarked upon its second examination of the retransmission royalties. The tariff certified as a result of this process shared several main features with its predecessor: a flat rate of $100 a year for small systems, rates that do not depend on the number of distant signals

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written arguments.

[3] See *infra*, footnote 8.

[4] *Royalties for Retransmission Rights of Distant Radio and Television Signals (Re)* (1990), 32 C.P.R. (3d) 97 (Cop. Bd.). (The first retransmission decision)

[5] *Royalties for Retransmission Rights of Distant Radio and Television Signals (Re)* (1993), 47 C.P.R. (3d) 327 (Cop. Bd.). (The second retransmission decision)

[6] *Local Signal and Distant Signal Regulations*, SOR/89-254, *Canada Gazette* Part II, Vol. 123, p. 2579; *Definition of Small Retransmission Systems Regulations*, SOR/89-255, *Canada Gazette* Part II, Vol. 123, p. 2588.

[7] *Retransmission Royalties Criteria Regulations*, SOR/91-690, *Canada Gazette* Part II, Vol. 125, p. 4647.

retransmitted to each premises, a scaling in of the tariff for systems serving no more than 6,000 premises, and discounts for duplicate signals and for certain types of premises. An added feature was a discount for Francophone markets. The second retransmission decision was challenged, unsuccessfully, before the Federal Court of Appeal.

On January 1, 1995, amendments to the definition of small retransmission system[8] came into force.

C. THE ISSUES

The eight proposed television tariffs filed by the collectives were virtually identical to the 1992-94 tariff. The only major difference was that collectives representing broadcasters asked for an increase in the rate to account for the new compilation right.

The collectives filed with their proposals a letter informing the Board that they had reached a settlement with CCTA on all issues relating to the royalties to be paid for the retransmission of television signals in 1995, 1996 and 1997, except the compilation claim. A memorandum of agreement between the collectives and the objectors was executed on July 14, 1995; it was filed with the Board, with an agreed statement of facts, on September 28, 1995.

The agreed statement of facts states that there has been no material change in the circumstances or facts leading to the second retransmission decision other than the amendments to the small system definition and the legislative changes pertaining to compilations. The participants also state that they consider the rates contained in the agreement to be fair and equitable.

Under the agreement, the rates for television would remain the same as in 1994 in all but two respects. First, broadcasters could argue in favour of an increase of between 1¢ and 3¢ to account for their compilation claim.[9] Second, the rate for small systems could be changed to account for the amendment to the definition of small retransmission system, but could not be increased to account for the compilation claim.

On October 13, 1995, the interested collectives informed the Board that they had agreed on the sharing of any royalties attributable to the compilation claim. BBC would get 28.717 per cent, CBRA 22.621 per cent, CRC 9.633 per cent and CRRA 39.030 per cent.

As a result, the proceedings focused on the following issues. Is the broadcasters' compilation claim valid? If it is, should its value be accounted for through a rate increase or through a reallocation of royalties? Is compilation worth anything in the retransmission market and if so, how much?

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[8] SOR/94-754, *Canada Gazette* Part II, Vol. 128, page 4091.

[9] That is, 1¢ for systems serving up to 3,000 premises, 2¢ for those serving between 3,001 and 6,000 premises, and 3¢ for those serving more.

II. THE BROADCASTERS' COMPILATION CLAIM

In 1990, broadcasters sought compensation for the use of their signals by retransmitters. They claimed that this constituted a use of their programming schedule, which they characterized as a compilation of works entitled to protection under the *Act*. The Board rejected this claim, stating that while compilation required considerable skill and effort, the broadcast day was not a protected work within the meaning of the *Act*. Only literary compilations[10] were protected. The broadcast day, which comprised a variety of dramatic and other works, did not result in the creation of a literary compilation. The Board also found that the retransmission of the programs listed in a programming schedule did not constitute the retransmission of the schedule. The Federal Court of Appeal upheld the Board's ruling on every point.[11]

On January 1, 1994, amendments to the *Act* implementing the terms of the *North American Free Trade Agreement* (*NAFTA*) came into force.[12] Compilation was defined as, (a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or (b) a work resulting from the selection or arrangement of data. Explicit references to compilations were included in the definitions of all four categories of works. Finally, the *Act* deemed that a compilation containing more than one category of works is a compilation of the category making up the most substantial part of the compilation.

A. IS THE BROADCASTERS' COMPILATION CLAIM LEGALLY VALID?

BBC, CBRA and CRRA (the Proponents) want the compilation claim recognized.[13] They do not seek compensation for the retransmission of the signal as such, but for the retransmission of programming compilations carried on the signal which, they argue, the *Act*, as amended, now protects as dramatic works.

Those who are against recognizing the compilation claim (the Opponents), argue that the Federal Court of Appeal has already determined, in the *FWS* decision, that a broadcaster's efforts do not result in a work protected under the *Act* and that compilations of broadcast programs lack the essential characteristics of works protected under the *Act*. They also maintain that the compilation claim fails because program owners have not authorized the inclusion of their programs in the compilation.

The Board generally accepts the arguments put forward by the Proponents.

The context of the application for review that resulted in the *FWS* decision, the wording of the *Act* as it then stood and the amendments made to it since, all reinforce that *FWS* did not settle the issue that now stands before the Board. The following passage from the decision leaves little doubt about this:

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[10] Anthologies and the like.
[11] *FWS Joint Sports Claimants* v. *Canada (Copyright Board)*, [1992] 1 F.C. 487 (C.A.), at 496f-497j. [*FWS*]
[12] *North American Free Trade Agreement Implementation Act*, 1993, S.C. ch. 44, ss. 52 to 80. [*NAFTA*]
[13] CRC did not participate actively in the proceedings but asked that its broadcaster members, PBS stations and TVOntario, benefit from any favourable ruling on the compilation issue.

> "The fourth issue is whether there can be copyright in the compilation ... The majority of the Board recognized the expertise and creativity required to make these compilations ...".

The Board, however, decided against according copyright protection to these programs as they are broadcast in totality in accordance with the agenda that has been prepared. The Board wrote...:

> *A broadcaster's programme schedule is a literary work; however, the retransmission of the programs listed in the schedule does not constitute the retransmission of the schedule.*

A 'broadcast day', in other words, is not a literary work as broadcast, even though the written schedule for it may be such a work.

The Court recognizes the difference between there being no copyright in a broadcast *per se* and there being no copyright in a broadcast according to a schedule ... In either case, there is nothing to be copyrighted in addition to the actual shows being broadcast, ... It is not a new work. There is no editing or creative input added to the shows themselves. The written compilation may be a collection of literary or dramatic works, but that does not make the broadcast day a literary or dramatic work itself. Nor is the broadcast day a "cinematographic production."[14]

That passage contains nothing allowing one to conclude that the Court would have dealt with the issue in the same way had the *Act* read as it does now. The Court's comments were directed at the Board's rejection of the compilation claim. That rejection relied on a legal analysis of the scope of copyright protection in the *Act* as it then read.[15] It is unreasonable to assume that the Court or the Board would necessarily have come to the same conclusions had the *Act* read as it now does.[16]

Nor does that passage state that compilations of broadcast programs are not sufficiently original to constitute protected works. The Court agreed with the Board that the written version of a broadcaster's schedule is entitled to copyright protection. The written schedule and the broadcast compilation result from the same compilation skill and effort; if the former is sufficiently original to be protected, the latter also is.

The *FWS* decision does not stand for the proposition that a compilation must include additional creative inputs from the broadcaster in order to qualify as original. Even if it did, the proposition would no longer be correct. The *NAFTA* amendments make it clear that the necessary ingredient for a compilation to constitute a protected work is the selection or arrangement of the included works, not the editing or addition of creative input to the works themselves. In any event, the Board is satisfied that broadcast compilations meet both tests.

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[14] *FWS*, 496f-497j.

[15] The conclusion that only literary compilations were protected is an obvious case in point.

[16] One obvious corollary is that the broadcasters are not estopped from arguing the issue. The *FWS* decision hinges on the conclusion that "*A 'broadcast day' ... is not a literary work.*" The *Act* now protects compilations of dramatic works. The legal principles applicable to the first retransmission decision are therefore materially different from those applicable to the Compilers' present claim.

CCC argues that program owners have not authorized the inclusion of their programs in compilations. The Board disagrees. Broadcasters cannot broadcast a program without creating a compilation. Indeed, owners would not allow their programs to be randomly broadcast, and would insist that broadcasters select and arrange them in the way that best suits the owners. The right to create the compilation is necessarily included in the right to exhibit or telecast.[17]

The Opponents raised other arguments. They maintain that the broadcaster's "compilation" lacks certainty and is no more than an "aggregation," not a protected compilation within the meaning of the *Act*. They also argue that the combined effects of simultaneous substitution and Canadian content rules eliminate the ability of Canadian broadcasters to control their station schedules. To the extent that these points even need to be addressed, the Proponents' arguments deal adequately with all of them. In any event, none, taken individually or collectively, can change the basic conclusion that broadcast compilations are now protected works.

The Board therefore finds that broadcast compilations are compilations of dramatic works, protected as such under the *Act* as amended.

B. SHOULD THE NEED TO COMPENSATE COMPILATION INCREASE THE RATE?

Compilations are protected works entitled, in principle, to compensation under the retransmission regime. This can be done either by increasing the rate paid by retransmitters or by adjusting the allocation among the collectives.

BBC,[18] CCC and SOCAN maintain that a valid compilation claim should increase the rate. The rate of 70¢ was set when the Board held that broadcast compilations were not protected works; that rate, according to them, reflects only the value of programs and music. Compilations are a new and incremental form of copyright, and should attract a new and incremental royalty payment.

For their part, CCTA and Regional argue that increasing the rate would be inconsistent with the proxy approach used to derive that rate. The proxy selected by the Board, *Arts & Entertainment* (A&E), was a compiled signal; its value already took into account the existence of the compilation, whether or not recognized by law. From this, they infer that the compilation claim should have only allocation implications.

The Board agrees with CCTA and Regional. The recognition of the compilation claim should not affect the rate. The rate of 70¢ was arrived at by looking at the whole signal, not by adding up the value of individual underlying rights.[19]

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[17] Program owners could, as a term of the broadcast licence, claim benefits flowing from the creation of the compilation. They have not done so.
[18] CBRA and CRRA expressly refrained from expressing a view on the issue. CRC, who had agreed with this approach in its statement of case, did not address the matter in its argument.
[19] This may be why, in the first retransmission decision, both the majority and the dissenting member dealt with the issue of compilation *after* a conclusion had been reached as to the rate

CCC's argument that this approach goes against the agreed statement of facts filed by the participants is incorrect. The agreement specifically states that the absence of material changes in circumstances pertains to the appropriate royalty rate, not to the allocation.

Having determined that the royalty share for compilation should be addressed through allocation rather than through a rate increase, two issues remain. Should compilation receive any compensation, and if so, how much?

C. SHOULD BROADCASTERS RECEIVE ANY RETRANSMISSION ROYALTIES FOR THEIR COMPILATIONS?

The Proponents ask for compensation for providing direct and indirect value to retransmitters. For their part, the Opponents offer three reasons for, according to them, compilations having no value in the retransmission market. First, compilations are a marketing device, produced for the local market with a view to increasing advertising revenue, and are already fully compensated. Second, compilations seek to increase market share and popularity; retransmitters are interested only in providing high quality and varied programming. Third, American authorities have already held that the broadcast day is of no value to retransmitters.

Compilations are protected works. In the first and second retransmission decisions, the Board avoided using qualitative factors to value programs entitled to protection. It refused to discount viewing impressions for local news or to value more highly impressions of sporting events. Absent compelling argument,[20] compilations should be compensated. None of the arguments put forward by the Opponents meets that test.

Moreover, to refer to compilations as "merely a marketing device" aimed at the local market misses the point. Compilations and programs both aim at attracting viewers and generating maximum revenues for their owners. In both cases, the primary market is a local market. Programs do not receive lower retransmission royalties for that reason; compilations should not be treated differently. The compilation is a protected work. There is no reason to believe that viewers derive less value from the compilation efforts on distant signals than they do on local signals.

The American experience on this issue is different. The Copyright Royalty Tribunal (CRT) held that it had no evidence showing any value in compilations; the same certainly cannot be said of these proceedings. Moreover, the CRT reached its decision in the context of the American retransmission regime, on the understanding that Congress did not intend that broadcasters receive compensation for compilations.[21]

D. HOW MUCH ARE COMPILATIONS WORTH?

According to the Proponents, their share of the royalties should equal the share of a station's total expenses attributable to compilation. They argue that this approach, which they say is

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[20] See the Board's ruling on "uncounted short programs" in the second retransmission decision.
[21] See the testimony of Mr. Dennis Lane, Tr. at 798-809.

similar to the methodology used by the Board in setting the share allocated to music, should be followed for valuing compilations.

The Opponents argue first, that the evidence offered by the Proponents is unreliable, second, that the formula used by the Proponents is different from that used by the Board for music and, third, that a valid analogy cannot be made to music. The value of music has already been determined by the Board under SOCAN's Tariff 2; the Board has never valued compilations. They add that even if the compilation costs are a measure of the value of compilations to broadcasters, they cannot be used as a proxy to measure the value of compilations to retransmitters.

The formula used to set SOCAN's share of royalties should not be used to determine the share attributable to compilations. Music is included in all programs. With compilations, it is the other way around: programs are included in compilations.

In any event, the approach favoured by the Proponents is both inappropriate and uncertain. Their attribution of all or part of some expenditures to compilation efforts in distant markets is, at best, unreliable and, at worst, involves important value judgments that the Board cannot endorse. Some categories of expenses [22] have little or no connection to the selection and arrangement of programs. Furthermore, the Board has already rejected using programming costs to allocate royalties in situations where this can be done using viewing.[23]

In the first retransmission decision, the Board used viewing as the best means available to allocate royalties among collectives. There are some difficulties in applying this approach to compilations, which represent the totality of available programming. All broadcasters' compilations are available all of the time. However, no one watches television all the time, and anyone watching television watches only one program at a time. Therefore, while viewers watch whole programs (thereby entitling those programs to full viewing credits), only a small portion of broadcasters' compilations is ever viewed.

It is nevertheless possible to establish the share of compilations that is actually viewed, with the following calculation:

- BBM monitors 140 hours of viewing a week on each signal. A cable subscriber receives on average 4.35 distant signals, or 609 hours per week of BBM monitored programming on distant signals. The average subscriber spends 23.3 hours a week watching television; 17.56 per cent of that time (4.09 hours) is spent watching distant signals. Therefore, each viewer views, in any given week, 0.67 per cent (4.09 hours/609 hours) of the distant signal compilations made available to him or her.[24]

This formula grants compilations the same value as other works entitled to compensation under

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[22] Line, microwave and satellite charges and sales; technical and administrative costs associated with the operation of the station; accounting costs; salaries of maintenance staff; traffic area expenses.
[23] Sports programming is a case in point.
[24] This calculation is based on the data filed in the 1992 hearing. Since the participants have agreed that no material change has occurred since then, it is appropriate to use this data.

the retransmission regime. That regime compensates the owners of protected works, not the owners of signals. Compilations receive little or no viewing as works; therefore, it is normal that they receive only a small share of the royalties.

The situation of compilations can be distinguished from that of uncounted short programs.[25] Those programs are less attractive than the programs they precede, interrupt or follow. Their viewing is incidental to the viewing of the main program. Viewers rarely decide to watch them; instead, they are subjected to them. By contrast, the viewing of a compilation is not accidental; the viewer who chooses to watch a program on a CTV affiliate chooses to watch at the same time the compilation of which that program is an integral part.

Compilations are therefore entitled to 0.67 per cent of the royalties.

E. VARIATION OF THE 1994 TARIFF

On January 21, 1994, CBRA filed, pursuant to section 66.52 of the *Act*, an application to vary the 1992-94 tariff. On February 8, 1994, the Proponents filed, pursuant to section 66.51 of the *Act*, an application for an interim tariff. On February 28, 1994, the Board made the 1994 tariff interim effective March 1, 1994.

The Proponents ask to be compensated for their compilations from the date the *NAFTA* amendments came into force. CCC submits that the Board cannot vary retroactively the 1994 tariff for the time preceding the effective date of its interim decision.

Two issues need to be addressed. Have the requirements for an application to vary been satisfied? If so, from what date should a compilation claim be reflected in the 1994 tariff?

i. Have the requirements for an application to vary been satisfied?

Section 66.52 of the Act states that: *"A decision ... respecting royalties ... or their related terms and conditions ... made under subsection ... 70.63(1) may, on application ..., be varied ... if ... there has been a material change in the circumstances pertaining to the decision since it was made."* These requirements have been met. The coming in force of the NAFTA amendments to the Act, on January 1, 1994, constitutes a change in the circumstances underlying the second retransmission decision. The change is not only material, but central to the issue of the status of the broadcast day as a protected work.

ii. From what date should compilations be compensated?

The date of an interim order is not the date as of which a final order can be varied. The power to vary interim orders is inherent.[26] Moreover, the power to vary a final order is distinct and independent from the power to issue an interim order. Many decision makers who can vary final

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[25] Second retransmission decision, pp. 66-67.
[26] "the power to make interim orders necessarily implies the power to revisit the period during which interim rates were in force." *Bell Canada* v. *Canada (CRTC)*, [1989] 1 S.C.R. 1722, 1756. [*Bell Canada*]

orders have no power to issue interim orders.

Another date must therefore determine how far back the decision to vary a final order can go. The Board is of the view that it can vary the 1992-94 tariff as of the date of the material change in circumstances, i.e. January 1, 1994.

A tribunal's power to vary its own final orders is necessarily constrained by the same limits as the power to make the original order.[27] Otherwise, the power to vary final orders is very broad:

> "[To vary means] 'to cause to change or alter; to adapt to certain circumstances or requirements by appropriate modifications' nor do I accept the view that the word 'vary' cannot apply retroactively. It has not such a limited meaning and circumstances will frequently arise where it must have a retroactive effect."[28]

Some powers to vary are inherently prospective, others, inherently retroactive. A ruling on a financial entitlement (unemployment insurance, for example) usually takes effect from the date from which the entitlement existed, while one that cures a defect may only be prospective. Much depends on the statutory context. The regime the Board administers has large elements of retrospectivity. Moreover, section 66.52 of the *Act* in no way limits the Board's power to vary a tariff so long as the preconditions for variations are met.[29]

Of course, the Board is not bound to vary the final order as of the date of the change in circumstances. A certain measure of discretion can be exercised to account for such factors as the diligence of the applicant and the potential prejudice to others. In this case, CBRA acted with diligence, and the issuing of an interim order minimized the risk of unexpected disruptions. The collectives suffer no prejudice. They are still getting what they are entitled to; furthermore, they should have no difficulties in adjusting their distributions to account for the relatively small amounts involved. The variation can be easily implemented through adjustments among the collectives.

Alternatively, and at a minimum, the Board must be able to vary an order from the date it is asked to do so. To hold otherwise could prejudice those affected by a material change for no other reason than the unavoidable delays between the time an application to vary is filed and the date on which it is disposed of. The application to vary was filed on January 21, 1994. Payments for the period starting January 1, 1994 (the date at which the compilation claim became valid) were due on January 31, 1994 for small systems, and on February 28, 1994 for all others. There is little doubt that the Board can vary the allocation of any payment due after the date of the application to vary. The result, in effect, would be the same as if the Board's decision were effective as of January 1, 1994.

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[27] *Canada (Director of Investigation and Research)* v. *Air Canada*, [1994] 1 F.C. 154 (C.A.).

[28] *Bakery and Confectionery Workers International Union of America Local No. 468* v. *White Lunch Ltd.*, [1966] S.C.R. 282, 295.

[29] The *Bell Canada* decision is not determinative of the issue, since Gonthier J. (at 1758) found it unnecessary to rule on whether the power to "vary" a decision includes the power to vary these decisions retroactively.

III. DISPUTED PROGRAMS

A. INTRODUCTION

In the first and second retransmission decisions, the Board outlined principles it intends to rely upon in disposing of entitlement disputes:

- the author or first owner of the program (usually the producer) is presumed to be the owner of the copyright;
- absent clear language or a necessary implication to the contrary, a distributor shares only in the revenues it generates through its own licensing efforts. Thus, contracts providing that the distributor will be compensated for placing a series in all media do not entitle the distributor to a share of retransmission royalties;
- a distributor cannot transfer more rights than he has acquired from the producer. Therefore, a clause in a sub-licensing agreement is not, of itself, sufficient to entitle the sub-licensee to share in retransmission royalties;
- clear language will be required in agreements that predate the statutory recognition of retransmission rights in order to conclude that the original copyright owner transferred those rights.

In these proceedings, all title disputes involve CRC and CBRA. These disputes raise two issues. First, are there instances where broadcasters must collect royalties to which they are entitled from CRC? Second, who, between the producer and the broadcaster, is entitled to receive retransmission royalties?

No hearings were held on these issues. Parties exchanged written arguments and exhibits. The process was simple and effective. The Board thanks the participants for their cooperation.

B. PRELIMINARY ISSUE

CRC filed several forms received from producers authorizing it to collect royalties for disputed titles, as well as a number of recent letters from producers stating either their intentions at the time of signing the contract or their wish that CRC be allowed to collect royalties for those programs. These documents are irrelevant and no account was taken of them. A producer cannot improve its entitlement to royalties merely by filing with a collective a self-serving statement that it owns the rights or wishes that those rights be managed in a certain way.

C. SHOULD CRC COLLECT CERTAIN ROYALTIES TO WHICH A BROADCASTER IS ENTITLED?

CRC's position is that where a broadcaster has obtained from the producer something less than a full assignment of copyright, the copyright continues to be owned or controlled by the producer and the collective designated by the producer should represent the title. It argues that the authorization to "receive, keep and claim" retransmission royalties for a limited period of time and for a particular broadcast signal is not a grant of rights to control the manner of collecting the royalties, but a direction to CRC for payment of the retransmission royalties. It adds that broadcasters with a transitory economic interest should not dictate the means by which royalties are initially collected on behalf of the copyright owner.

CBRA argues that a collective can claim royalties only for persons who are entitled to receive them. It considers that CRC misunderstands the *Act*, ignores the express terms of the contracts, and conducts an analysis contrary to the Board's earlier decisions and inconsistent with the Board's test year approach to allocation.

Viewing impressions shall be assigned to CBRA in all cases where the broadcaster is entitled to receive retransmission royalties. The ability of a person to designate a collective to receive retransmission royalties attaches to the right to receive payment from the retransmitter, and does not constitute a separate right. Therefore, the collective authorized by the person entitled to payment will be attributed the viewing impressions for the purposes of allocation. Conversely, the producer who authorizes a broadcaster to receive and to claim the retransmission royalties relinquishes that right: CRC cannot manage for the producer a right that the producer no longer has.

A contract could be worded to give a broadcaster the right to receive retransmission royalties from CRC. However, none of the contracts filed by the participants contains such restrictions. All, clearly or by necessary implication, give the broadcaster the right to determine who will act as the collecting agent. In the case of nine of the programs, the broadcaster [TRANSLATION] "is authorized to receive, keep and claim". This is not a mere direction of payment. The contracts relating to *Hands Up! Hands On!* and *Take Part* even provide that the broadcaster is to remit part of the royalties to the producer. This is inconsistent with royalties being paid to CRC in the first place.

The "practical advantages" alluded to in CRC's argument are non-existent. The problems it outlines arise from the very existence of multiple collectives, and not from disputes over titles. Every collective's portfolio of programs changes constantly. More importantly, practical considerations cannot override legal entitlements.[30]

D. In Which Cases Are the Broadcasters Entitled to Receive the Retransmission Royalties?

i. Twenty Minute Workout

The viewing impressions are assigned to CRC.

The documents submitted by the parties are silent on the right to receive retransmission royalties for Canada. Nothing indicates that CITY-TV, as distributor, is entitled to share in revenues that are not generated through its own licensing efforts.

Even if we assume, without deciding, that Article 1 of the Rider reserved the American retransmission right to the producer, it does not follow that Canadian retransmission rights, which are not so reserved, accrued to the broadcaster upon their creation in 1989. The agreement

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[30] The Board reached the same conclusion in the second retransmission decision, when it dismissed CRC's argument that "it would be easier to let CRC manage the rights" to PBS programs owned by CRRA members.

predates by several years the Canadian retransmission regime. That Nelvana has taken no steps to extend the American limitation to Canadian rights is irrelevant.

Finally, and most importantly, the wording of the contract is clear. Article 12(h), which provides that CITY-TV retains all Canadian distribution revenues, must be read with the introductory paragraph of Article 1, according to which Nelvana sells to CITY -TV *"the ... right to distribute and telecast the Programs ... for exhibition by means of free television broadcast ..."*. CITY-TV is entitled only to broadcast the program on conventional broadcast stations and to sell similar rights to other conventional broadcast television stations.

ii. Brownstone Kids

The viewing impressions are assigned to CRC.

Article 1 of the contract states that "CKCO-TV and *Visual* will co-produce" the program. Normally, co-producers co-own the copyright. In this case, however, other provisions make it clear that Visual retains the copyright. Article 7 allows CKCO-TV to run the program only for a limited period of time. It also provides that CKCO-TV shares in Canadian syndication and sales, not in all revenues. Article 9 provides that Visual owns 100 per cent of all foreign sales.

Even if CKCO-TV co-owns the copyright as a result of the contract, Article 7 limits CKCO-TV's entitlement to syndication and sales;[31] given the Board's views already expressed on distributors' entitlements, Visual retained the right to receive retransmission royalties.

The fact that similar arrangements may have motivated CBRA and CRC to share the viewing impressions for other titles is irrelevant to the decision the Board has to make: dealings between the collectives cannot be an indication of the intentions of the producer and of the broadcaster at the time they negotiated the contract, unless they constitute well-known and accepted practices throughout the industry, which is obviously not the case here.

Article 8 of the contract, which grants CKCO-TV a right of first refusal on any new production, is irrelevant to the determination of who owns the copyright. Each program constitutes a separate work. That clause simply states that Visual will not create a new work without first offering a licence to CKCO-TV.

iii. Croque-Monsieur and Croque-Madame

The viewing impressions are assigned to CBRA.

The contract provides for the broadcast of 74 programs during the 1993-94 season, and the rebroadcast of 30 of those programs up to August 31, 1995. The right granted is exclusive. Article 14 confirms the grant, already found in Article 1.4, of exclusive rebroadcast rights, and

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[31] CRC correctly points out that the reference to sharing in sales to "cable" is limited to cable transmission of services other than over-the-air services, such as YTV.

then adds a grant of "les droits de retransmission" to each program.

The assignment of "*les droits de retransmission*" is sufficiently clear; it conveys nothing if not the entitlement to collect royalties. The provision deals directly and effectively with two issues addressed in the second retransmission decision. First, the Board held that a transfer of "*le droit de diffusion*" was ineffective to transfer an entitlement to retransmission royalties. The change to "*droits de retransmission*" must be taken to address that issue. Second, the Board ruled that broadcasters do not require a right to retransmit in a compulsory licensing regime. The only "*droits de retransmission*" left to be transferred are the right of remuneration and the eventual right to authorize other forms of retransmission. The contract was signed six months after the decision was issued. The producer must be taken to have conveyed more than just an unnecessary and ineffective right to retransmit.

Other provisions in the contract bolster the position of CBRA. Thus, Article 1.6 describes the territory for which the licence is granted as including all non broadcast retransmission of TQS signals. Again, that right means nothing if TQS does not get the retransmission royalties. CRC is correct in stating that the word "*droits*", as used in Article 1.4, refers to a broadcast *licence*. Normally, the meaning of a word remains the same throughout a contract. In this case, however, this cannot be done without rendering Article 14 meaningless. Furthermore, CBRA correctly points out that the French version of the *Act* sometimes uses the word "*droits*" to denote retransmission royalties.[32]

Article 14 could be clearer. It could, for example, grant "*le droit de percevoir des redevances pour la retransmission de l'émission sur le signal de TQS*". In that respect, the second paragraph of Clause 11 in the contract concerning the program called *SQRETÉ 5-0* settles the issue once and for all.

iv. Special - Céline Dion

The viewing impressions are assigned to CRC.

On July 1, 1993, Paragon Entertainment contracted with Cycle Film, one of its wholly-owned subsidiaries, for the production of the program. Section 1.2 of the contract provides that Paragon is the owner of all the copyrights. The contract contains no express provision respecting retransmission rights.

On July 20, Cycle Film, in two virtually identical contracts,[33] assigns to Paragon International the rights to distribute the Special.[34] Section 3 of those agreements state that the distributor is entitled to collect retransmission royalties from CRC and AGICOA on behalf of the producer.

At an undetermined date, *MusiquePlus* signed with TQS a so -called production contract for the

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[32] See subsection 70.61(1) and paragraph 70.63(1)(a).
[33] One pertains to the world except Canada, the second, to Canada.
[34] Whether Cycle Film still owned the distribution rights after having signed its deal with Paragon Entertainment is an issue between Paragon Entertainment, Cycle Film and Paragon International.

program. That contract, which is on a standard TQS contract form, purports to grant to TQS the right to receive retransmission royalties for the province of Quebec. Nothing on the record establishes a link between Paragon Entertainment, Cycle Film or Paragon International on the one hand, and *MusiquePlus* on the other.

CBRA does not deny that Paragon Entertainment is the original owner of the copyright. It provided no evidence that *MusiquePlus* was the original producer or that it acquired the retransmission rights from Paragon or anyone else. Since its contract with TQS is undated, we do not know whether it was signed before or after the Paragon deals. Therefore, Paragon Entertainment, Cycle Film or Paragon International own the rights, and *MusiquePlus* could not have granted them to TQS.[35]

v. Hands Up! Hands On! and Take Part

The viewing impressions are assigned to CBRA. In order to pay the producer 25 per cent of distant signal retransmission royalties received,[36] MCTV must receive the royalties in the first place.

vi. Autovision, Bon appétit, Chambres en ville, Les grands procès, Piment fort, Quelle histoire, Sonia Benezra and SQRETÉ 5-0

In all these cases, the broadcasters' contracts with the producers entitled them to receive retransmission royalties. Therefore, the viewing impressions are assigned to CBRA.

E. CONCLUSION ON ENTITLEMENT DISPUTES

The viewing impressions for Céline Dion, Twenty Minute Workout and Brownstone Kids, are assigned to CRC. The viewing impressions for *Autovision*, *Bon appétit*, *Chambres en ville*, *Croque -Monsieur*, *Croque-Madame*, *Les grands procès*, Hands Up ! Hands Down!, *Piment fort*, *Quelle histoire*, Sonia Benezra, *SQRETÉ 5-0* and Take Part are assigned to CBRA.[37]

IV. THE FINAL ALLOCATION

CCC provided the Board with a table showing each collective's share of the royalties, using the Board's previous methodology (viewing impressions adjusted for supply), with with appropriate provisions for titles that were still disputed at the time. These figures provide the necessary data for determining the shares of all collectives except SOCAN and MLB.[38] No account was taken of

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[35] TQS might have prevailed if it had produced a contract whereby Paragon Entertainment, Cycle Film or Paragon International purported to grant to *MusiquePlus* the right to receive retransmission royalties, and if it had been established that *MusiquePlus* had not been informed of the clause providing that distributor's rights were limited to collecting royalties from CRC, on behalf of the producer. This was not done.
[36] A condition imposed by paragraph 5.2 of the relevant contracts.
[37] During the exchange of arguments, the parties agreed to assign viewing impressions for *SCTV* to CRC, and those for *Kidstreet* to CBRA.
[38] MLB's share could not be established because no baseball games were shown during the BBM viewing surveys

a possible compilation claim. Table I shows the results, adjusted to account for the Board's decisions on title disputes.

TABLE I / TABLEAU I

VIEWING SHARES BEFORE SOCAN, MLB AND COMPILATION
PARTS D'ÉCOUTE SANS LA SOCAN, LA LBM ET LE DROIT DE COMPILATION

Collective/ Société de perception	Viewing (15-minute impressions) Écoute (impressions de 15 minutes)			Viewing Impressions Adjusted for Supply (Canadian: 1.143; U.S.: 0.961) Écoute rajustée pour le temps d'antenne (Canada : 1,143; É.-U. : 0,961)		
	Canadian Signals/ Signaux canadiens	American Signals/Signaux américains	TOTAL	Canadian Signals/Signaux canadiens	American Signals/Signaux américains	TOTAL
BBC	0	5 788 561	5 788 561	0	5 562 807	5 562 807
CBRA/ADRRC	11 692 513	281	11 692 794	13 364 542	270	13 364 812
CCC/SPDAC	23 957 177	105 550 538	129 507 715	27 383 053	101 434 067	128 817 120
CRC/SCR	5 146 518	21 936 983	27 083 501	5 882 470	21 081 441	26 963 911
CRRA/ADRC	4 041 472	32 769 766	36 811 238	4 619 402	31 491 745	36 111 148
FWS	1 035 028	2 224 253	3 259 281	1 183 037	2 137 507	3 320 544
TOTAL	45 872 708	168 270 382	214 143 090	52 432 505	161 707 837	214 140 342

CCC indicated that both SOCAN and MLB shares were, by agreement between all collectives, 3.55 per cent and 1.59 per cent respectively. The Board is unconvinced by arguments that the shares of either SOCAN or MLB should be corrected downwards to account for the share attributed to compilations. Therefore, shares for SOCAN, MLB and compilations are taken "off the top". They add up to 5.81 per cent.

Table II outlines the manner in which each collective's share is arrived at.

TABLE II / TABLEAU II

FINAL ALLOCATION / RÉPARTITION FINALE

Collective/ Société de perception	Before adjusting for compilation, SOCAN and MLB/ Avant l'ajustement pour	After adjusting for compilation, SOCAN and MLB/ Après l'ajustement pour la	Shares of Compilation, SOCAN and MLB/Quotes-parts pour la	Final Allocation/ Répartition finale

for the Fall of 1993 and the Spring of 1994, which were used for this purpose.

	la compilation, la SOCAN et la LBM	compilation, la SOCAN et la LBM	compilation la SOCAN et la LBM	
BBC	2.5977%	2.4468%	0.1924%	2.64%
CBRA/ADRRC	6.2411%	5.8785%	0.1516%	6.03%
CCC/SPDAC	60.1555%	56.6604%		56.66%
CRC/SCR	12.5917%	11.8601%	0.0645%	11.92%
CRRA/ADRC	16.8633%	15.8836%	0.2615%	16.15%
FWS	1.5506%	1.4605%		1.46%
MLB/LBM			1.5900%	1.59%
SOCAN			3.5500%	3.55%
TOTAL	100.0000%	94.1900%	5.8100%	100.00%

V. SMALL SYSTEMS

Small retransmission systems are entitled to a preferential rate. In the second retransmission decision, that rate was $100 per year per system. For the reasons given by the Board in its decision of April 19, 1996 concerning SOCAN's Tariff 17, the tariff should remain unchanged notwithstanding the coming in force in 1995 of a new definition of small system. The target group remains essentially the same. While the maximum number of premises served has been raised to 2,000, the clearer notion of licensed area has been substituted for the more ambiguous notion of "community". Furthermore, as a result of section 3 of the Regulations, some systems serving no more than 2,000 premises will not be small systems because they belong to a unit. All in all, the economic realities facing small systems as a group remain the same.

.Paragraph 2(d) of the agreement reached between the collectives and the objectors states that "no royalties shall be payable for the Compilation Claims in respect of small retransmission systems." CCC argues that this must result in a different allocation of royalties for small systems than for others.

The Board disagrees. Paragraph 2(d) can be interpreted as meaning simply that small systems should not pay more as a result of the compilation claims. In any event, the Board is not constrained by the agreement when addressing issues of allocation.[39]

In this case, setting different allocation tables would create administrative difficulties, especially for those operating both small and other systems. The allocation of royalties for small systems shall be the same as for others.

VI. THE ROYALTIES TO BE PAID FOR RADIO RETRANSMISSION

On December 21, 1995, an agreement dealing with the radio tariff for 1995 and 1996 was filed with the Board on behalf of the objectors and collectives representing owners of works carried on distant radio signals. A further agreement, dealing with the year 1997, was signed by the same

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[39] Cabinet criteria, one of which requires the Board to take into account agreements reached between collectives and retransmitters, address only the quantum of royalties.

parties on June 14, 1996. The published tariff reflects the terms of the agreement.

VII. COMMENTS ON THE TARIFFS

This section outlines the differences in the wording of the 1992-94 and 1995-1997 tariffs.

A. CHANGES MADE TO ACCOUNT FOR THE NEW DEFINITION OF SMALL RETRANSMISSION SYSTEM

The definitions of "*licence*", "*licensed area*", "*premises*" and "*small retransmission system*", subsection 4(2), sections 7 and 16, subsection 22(3) and section 32 of the television tariff, as well as subsection 4(2) and sections 12 and 27 of the radio tariff, have been added or modified to account for the coming into force, on January 1, 1995, of a new definition of small retransmission system.

B. SPECIFIC SECTIONS OF THE TARIFF

i. <u>Small Systems</u> [Television Tariff, section 4; Radio Tariff, section 4]

The provision allowing a retransmitter to rely on the previous year's average number of subscribers has been amended in two respects. First, only those months in which a distant signal was being retransmitted by the system shall be used in the calculation. Furthermore, in the case of systems that were part of a unit on December 31 of the reference year but not on December 31, 1993, only those months during which the unit's composition was the same as on December 31 of the reference year will be used for this purpose.

These changes could substantially affect certain systems. Therefore, these changes will come into effect only on January 1, 1997. Subsection (4) achieves this purpose. Section 16 of the tariff is modified to reflect the changes to subsection 4(2).

ii. <u>Reporting Dates</u> [Television Tariff, section 22; Radio Tariff, section 17]

Subsection 22(3) is no longer necessary and is omitted.

iii. <u>Confidential Treatment</u> [Television Tariff, section 26A; Radio Tariff, section 21A]

CCTA asks that collectives be required to keep in confidence all information obtained from retransmitters, except for disclosure of any audit report to other collectives in accordance with an approved tariff, and be prohibited from making any use of such information, except for verification of the amount of royalties paid. CCC points out that this request was made in both previous hearings. It asks to be allowed to share this information whenever it "*may find it appropriate*", arguing that "*The database which has been provided by CCC and which will be constantly updated contains information of general value ...*".

Collectives should be able to use information that is not available from public sources in their dealings with their members, with other collectives and with the Board. They should not, however, be able to make such information more widely available or even, to market the

information. They remain free, of course, to share with anyone information that is otherwise available from public sources.

iv. <u>Interest</u> [Television Tariff, section 28; Radio Tariff, section 23]

The changes to this provision make it clear that interest is accrued daily, from the date an amount is due to the date it is received, and does not compound.

Subsection 30(2) is amended to provide that a payment made by mail shall be presumed to have been received three business days after the day it was mailed. This should address the concerns raised by CCC, while allowing for evidence to the contrary in exceptional circumstances.

v. Amendments to the 1992-94 Tariff

Section 32 amends section 14 of the *Television Retransmission Tariff, 1992-1994* to reflect the 0.67 per cent allocation to compilations as of January 1, 1994. Table III shows how the new shares were arrived at.

TABLE III / TABLEAU III

CORRECTED FINAL ALLOCATION FOR 1994 / RÉPARTITION FINALE CORRIGÉE POUR 1994

Collective/ Société de perception	Before adjusting for compilation and SOCAN/ Avant l'ajustement pour la compilation et la SOCAN	After adjusting for compilation and SOCAN/ Après l'ajustement pour la compilation et la SOCAN	Shares of Compilation/ Quotes-parts pour la compilation	Final Allocation/ Répartition finale
BBC	3.0090	2.8821	0.1924	3.07
CBRA/ADRRC	5.9350	5.6846	0.1516	5.84
CCC/SPDAC	61.8230	59.2147		59.22
CRC/SCR	14.0070	13.4160	0.0645	13.48
CRRA/ADRC	11.5960	11.1068	0.2615	11.37
FWS	1.9870	1.9032		1.90
MLB/LBM	1.6440	1.5746		1.57
TOTAL	100.0010	95.7810		
SOCAN		3.5500		3.55
Compilation		0.6700		
TOTAL		100.0010		100.00

vi. <u>Transitional Provisions</u> [Television Tariff, sections 33-34]

The main issue raised by the passage of time between January 1, 1995, the date the final tariff comes into force, and the date of this decision, is one of allocation. CCC suggested that retransmitters be required to comply with the allocations set in the final tariff from the month following the issue of the decision, and that the required adjustments between collectives, for the

past, be made by them, without the involvement of the retransmitters. The other collectives agreed with this approach. The collectives also agreed, at the suggestion of the Board, to allow the Board to settle transitional allocation issues if the collectives are unable to agree among themselves. The Board thanks the collectives for their efforts in making the transition from old to new shares as seamless as possible for the retransmitters.

No mention is made, in the transitional provisions, of interest that may be payable on the compensation payments. This is addressed satisfactorily in section 28 of the tariff.

vii. Forms

Some changes were made to the forms to account for the new definition of small retransmission system.

Changes in Form 2 reflect, on the whole, the approach suggested by CCC in its argument. A new Form 2 comes into effect on January 1, 1997 to reflect the amendments to section 4 of the tariff.

viii. Language of Communication with Retransmitters

The Board has received several complaints from *l'Association des câblodistributeurs du Québec* regarding correspondence addressed in English by certain collectives to some of its members. During the hearings, counsel for CCTA stated that the issue was being addressed.

Correspondence between a collective and a retransmitter should, as a matter of courtesy, be either in both official languages or in the retransmitter's language of choice. At a minimum, collectives should make use of the forms that are already published in French and English. The Board's wish is that the issue will not need to be revisited in the next retransmission decision.

Claude Majeau
Secretary to the Board